No. 11797

In the United States Circuit Court of Appeals for the Ninth Circuit

STATE OF CALIFORNIA, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF FOR THE UNITED STATES

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CITATIONS

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OPINION BELOW

The district court wrote no opinion. Its findings of fact and conclusions of law are at R. 40–47, 100–106, and 146–152.

JURISDICTION

These are appeals from three judgments in condemnation entered January 22, 1947 (R. 47–49, 107–109, 152–154). Notices of appeal were filed April 21, 1947 (R. 50, 110, 155). The cases were consolidated for trial (see R. 55–56) and for appeal (R. 58). The jurisdiction of the district court rests upon section 3 of the Act of July 19, 1940, 54 Stat. 779, 780, and the Second War Powers Act of March 27, 1942, 56 Stat. 177, 50 U. S. C. sec. 632 (R. 2, 66, 118). The juris-

diction of this Court is invoked under Section 128 of the Judicial Code, as amended, 28 U. S. C. Sec. 225a.

QUESTION PRESENTED

Whether land retained by the State of California for the sole purpose of providing ingress and egress to lots it had previously sold had more than a nominal value.

STATEMENT

The judgments appealed from (R. 47–49, 107–109, 152–154) award the State the sum of one dollar ($1.00) for each of four parcels of submerged land condemned by the United States.[1]

The lands were part of a larger tract of submerged land in the City and County of San Francisco condemned by the United States for the expansion of the Naval Dry Docks at Hunter's Point. The four parcels here involved aggregate 108.32 acres (R. 167–178) and were embraced in three complaints. After a trial without a jury (R. 165–270) the Court made separate

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[1] The question involved on these appeals was earlier presented to this Court. *State of California* v. *United States*, 153 F. 2d 558 (1946). There, in a trial to determine just compensation for a block of submerged land formerly owned by James S. Hutchinson, the successor in interest of the State's grantee, the State filed an answer claiming compensation for the streets touching the Hutchinson block. The trial court found that the State's interest in these streets had no pecuniary value. The State appealed. This Court said (153 F. 2d at p. 559): "It was error to permit the State to intrude into the Hutchinson valuation proceeding * * *. Its claim for compensation * * * should be asserted as one claim and not split into fractional demands which it may have judicially determined by the piecemeal method here employed." Accordingly, it struck that part of the judgment which denied the State any recovery.

findings of fact and conclusions of law in respect of the property included in each complaint (R. 40–47, 100–106, 146–152). However, the findings and conclusions differ only in describing the particular properties. All may be summarized as follows:

Before September 9, 1850 (when California was admitted to the Union), the lands were covered by the waters of the Bay of San Francisco. They passed to the State when it was admitted. A state statute (Cal. Stats. 1867–1868, p. 716) created a Board of Tide Land Commissioners, which was directed, first, to take possession of all land in the City and County of San Francisco lying under water and, second, to cause all of the State's property lying south of Second Street to be surveyed into lots and blocks. Pursuant to the statute the Board had the land surveyed and prepared a "Map of Salt Marsh and Tide Lands and Lands Lying Under Water." In March 1869, it adopted the map. As the state statute also ordered, the Board at public auction sold its title to the lots exhibited on the map. These sales were by lots as described by the map. The interest retained by the State in the lands here involved was retained only for the purpose of providing ingress and egress to the lots sold and was subject to easements for access to and from the lots. Accordingly, the State was entitled to $1.00 for each of the four parcels.

ARGUMENT

Appellant's interest in the lands condemned had only nominal value

The submerged lands were laid out in streets, blocks, and lots. As the trial court found (R. 43–44),

the lots were sold as such. Obviously, therefore, the interest retained by the State in the lands laid out as streets was retained only for the purpose of providing ingress and egress to the lots. *Berton* v. *All Persons,* 176 Cal. 610, 614–615, 170 Pac. 151 (1917); *Eltinge* v. *Santos,* 171 Cal. 278, 283, 152 Pac. 915 (1915); *Danielson* v. *Sykes,* 157 Cal. 686, 689, 109 Pac. 87 (1910); *Petitpierre* v. *Maguire,* 155 Cal. 242, 246–248, 100 Pac. 690 (1909); *Syers* v. *Dodd,* 120 Cal. App. 444, 8 P. 2d 157 (1932); *Crease* v. *Jarrell,* 65 Cal. App. 554, 559, 224 Pac. 762 (1924); *Davidow* v. *Griswold,* 23 Cal. App. 188, 192–194, 137 Pac. 619 (1913). Lands so burdened are not, despite appellant's contrary assertion (p. 5), entitled to be valued on the same basis as the lots to which they are servient. No one would buy lands which could be used only as public streets. Consequently, as has been held (*Mayor and City Council of Baltimore* v. *United States,* 147 F. 2d 786 (C. C. A. 4, 1945)), they have only nominal value. And so the trial court adjudged.

Appellant argues, however (pp. 15–19), that it was not bound by the delineations of the map adopted by the Board of Tide Land Commissioners. In other words, it maintains that—notwithstanding it had sold lands on the basis that the owners could enter and leave them freely—it was free to sell the streets and thus block the owners from approaching their properties or imprison them there. The argument is without merit. *McGinn* v. *State Board of Harbor Comrs.,* 113 Cal. App. 695, 299 Pac. 100 (1931). In that case, under facts legally indistinguishable from those in the

case at bar, the California court upheld the right of a lot owner in the submerged area to access thereto by means of the adjacent land delineated as a street. It said (113 Cal. App. at pp. 702–703):

> The state, as the owner of these tidelands under special grant from the United States, was authorized to plot and sell the land into private ownership. *In order to make these sales* the tide land commissioners were directed to lay out the land in blocks and lots showing streets, lanes, alleys and other public places and to sell the land *by lot number.* * * * Having authorized the preparation of the map and having approved the map as filed with the streets, lanes, and other public places delineated thereon the state stood in the same position as all owners of private property and must, therefore, be deemed to have dedicated to public use all the public highways and places as delineated upon that map. *Having immediately sold these lots in accordance with the map the state was without authority thereafter to withdraw from public use any of the streets shown upon the map* * * *. [Italics supplied.]

Appellant argues at length (pp. 5–15) that in testifying that the value of land laid out for streets was reflected in the value of the abutting property, the Government's witnesses fell into an error condemned in *United States* v. *Benedict,* 280 Fed. 76, 82–83 (C. C. A. 2, 1922). But the facts in the *Benedict* case were unlike those in the case at bar. There, the United States condemned a tract of submerged land and acquiesced in the trial court's finding that it was worth

in the aggregate $2.00 a square foot. Consequently, it was not concerned in the subsequent contest as to distribution of the award. *United States* v. *Dunnington,* 146 U. S. 338, 352. This contest was waged between the Langley Estate, which had formerly owned the entire area, and New York City, to which the Estate had conveyed 81,120 square feet, in trust to be laid out in streets. The district court distributed the entire amount to the Estate. In reversing and holding that the City should have an aliquot part of the award, the Circuit Court of Appeals said (280 Fed. at pp. 82–83):

> * * * the Langley Estate has been awarded all that the land is worth, streets and all, because, *when streets are opened,* the land they have left *will* be worth the amount of the award. This will not do. The government is called upon to make just compensation for things *as they are, not as they may be hereafter* * * *. [Italics supplied.]

The Government agrees that in the case at bar "it must make compensation for things as they are, not as they may be hereafter." But, as the trial court found, the streets here involved were laid out at least as early as 1869 (p. 3, *supra*). As it also found, the privately owned lots which the United States has acquired were sold by appellant on the premise that they abutted these streets. And, according to *McGinn* v. *State Board of Harbor Com'rs,* 113 Cal. App. 695, 703, 299 Pac. 100 (1931), the appellant cannot change its position. The evidence, quoted by appellant at pp. 9–11, was that the value of the property had been

increased fivefold by subdivision on this basis. In paying property owners on this basis, the United States has made compensation "for things as they are." This is unlike the *Benedict* case in which the property was given an over-all square-foot value rather than one based on the projected subdivision.

Appellant argues (pp. 15–20) that the dedication was not binding because never accepted by any authority. However, as indicated in *County of Inyo* v. *Given,* 183 Cal. 415, 420 191 Pac. 688 (1920), quoted (pp. 18–19) by appellant, acceptance by the public is not necessary to consummate a dedication so far as concerns the rights of those who buy property by reference to a subdivision map showing streets. Here, the United States has acquired the rights of such purchasers and is entitled to assert those rights in determining what is just compensation to the State when it takes the streets.

In saying (280 Fed. at p. 82) that the fact real estate "is held in trust for a public purpose does not in any way change its market value," the Second Circuit was wrong. It cannot be imagined why anyone would pay money to acquire property "held in trust for a public purpose." This being so, such property could have no market value. But the dictum was not tested; it was not involved in the affirming decision of the Supreme Court. 261 U. S. 294 (1923). It has not been followed in the later cases where streets have been condemned. *United States* v. *Los Angeles County,* 163 F. 2d 124 (C. C. A. 9, 1947); *Woodville* v. *United States,* 152 F. 2d 735 (C. C. A.

10, 1946), certiorari denied 328 U. S. 842; *United States* v. *Des Moines County,* 148 F. 2d 448 (C. C. A. 8, 1945), certiorari denied 326 U. S. 743; *Mayor and City Council of Baltimore* v. *United States,* 147 F. 2d 786 (C. C. A. 4, 1945); *Jefferson County* v. *Tennessee Valley Authority,* 146 F. 2d 564 (C. C. A. 6, 1945), certiorari denied 324 U. S. 871, rehearing denied 324 U. S. 891; *United States* v. *Prince William County,* 9 F. Supp. 219 (E. D. Va. 1934), affirmed 79 F. 2d 1007 (C. C. A. 4, 1935), certiorari denied 297 U. S. 714; *United States* v. *0.886 of an Acre of Land,* 65 F. Supp. 827 (E. D. N. Y. 1946); *United States* v. *Alderson,* 53 F. Supp. 528 (S. D. W. Va. 1944).

CONCLUSION

For the foregoing reasons, the judgment appealed from should be affirmed.

Respectfully submitted.

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